NO. 82-1931

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

ELI MESIROW and THOMAS MORRIS,

Petitioners,

vs.

PEPPERIDGE FARM, INCORPORATED,
a Connecticut corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. STARE DECISIS PRECLUDES SUMMARY JUDGMENT FOR PEPPERIDGE FARM ON ITS COERCIVE PRICE FIXING BY CONSIGNMENT AGREEMENT PROGRAM.

A. Under Simpson, the Only Issues of Fact Are Whether After 1977 Price Fixing Exists as to The Distributor's Chain Accounts and Whether Attempted Monopolization Exists in a Dominant Manufacturer's Control of The Business of a Nationwide Group of Independent Cookie Distributors.

In Simpson v. Union Oil of California, this Court held that coercive utilization of consignment agreements in a Fair Trade State which brought about business losses and loss of values was actionable per se under Section 1 of the Sherman Act (377 U.S. 13, 24-25). The McGuire Act in such a state raised an affirmative defense only.

It is manifest that the lower courts have raised the dissenting opinion of Justice Stewart as the law of the land and that only this Court may correct the error.

1. **Respondent cannot avoid the substantial evidence that it fixed and controlled the distributors' prices to their chain accounts.**

The basis of the error below is made clear by reason of Respondent's Brief in Opposition (hereinafter "Respondent's Brief"). It urges at p. 8 that summary judgment may be granted on this issue because petitioners admit that they always sold their accounts at different prices than Pepperidge Farm's. The claim is that the testimony (CR. 216, 62:14-19) had reference to Longs (Respondents Brief, p. 8). But there is not one mention of Longs in this citation. The testimony has reference only to Mom and Pop stores that were charged 24 cents a case more. The next claim of Pepperidge Farm is that the testimony of petitioner Mesirow was that he charged Longs a different price than Pepperidge Farm's price (Id., p. 9). This testimony disclosed that when Mr. Mesirow did attempt the different price, he was warned not to do so (at CR. 216, 419-426),

and that he stopped doing so (Petition, pp. 42-43).

Respondent also contends that "After the repeal of Fair Trade, Pepperidge Farm informed the distributors that it would no longer attempt to control in any way the wholesale prices charged by distributors to accounts which the distributors billed." (Respondent's Brief, p. 6.) In fact, the only documented information given to the nationwide group of distributors was that Fair Trade had been invalidated. The letter that Pepperidge Farm wrote to the distributors is contained in the appellate court files pursuant to a motion to augment the record made on May 27, 1982. The appellate court issued an order denying the motion, but allowed the letter to be lodged with the court. The order is attached hereto as Appendix A herein, and the letter of February 24, 1976 is attached hereto as Appendix B.

Another claim is that after Fair Trade any distributor was free to solicit any

chain to become the distributor's own customer (Id., p. 7). Petitioner's argument was that the distributor declarations filed by respondent would show a significant variation if this were true; the effect test (Petition, at pp. 45-49). The reply is that petitioners deliberately falsify the record and violate a good faith duty of accuracy (Respondent's Brief, pp. 7, 18). There is no excuse for this attempt to avoid the inferences to be drawn from respondent's self-serving declarations, prepared by its counsel. The issue is solicitation of the directly billed accounts (Petition, pp. 45-49). Petitioners' heading stated the issue. It is to be noted that petitioners filed an errata letter and served it on counsel for Pepperidge Farm on June 8, 1983. It informed Pepperidge Farm that the chart heading on p. 47 should have read, "Are Chain Accounts of P.F. Billed By the Distributor (Listed at 475, 481)." The directly billed chain accounts of Pepperidge

Farm listed at ER. 475, 481 are: Safeway, Lucky, Alpha Beta, QFI, Ralphs Market, Brentwood, Albertsons, Cala, Fry's, P & X, Co-op, Petrini, Park & Shop, P & W Market, and Piedmont.

The accounts listed at Respondent's Brief, p. 7, were thus shown not to be directly billed accounts of Pepperidge Farm except for Mr. Hermann. Thus respondent's declarations from the distributors show no significant variation.

The claim that the distributors were free to solicit any chain to become the distributor's own account is also directly contradicted by its written agreement which states that these accounts will be solicited on behalf of Pepperidge Farm. Pepperidge Farm cannot avoid in summary judgment the undisputed testimony that Mr. Mesirow was ordered not to bill Safeway or face the full pressure of Pepperidge Farm (Petition, p. 20).

The claim that Pepperidge Farm assumes all risks of the product is unsupport-

able. The Pepperidge Farm defense of negating the risk of stales is based on falsification of the facts. The first falsification is that Thrift Stores will accommodate the return of stales. Pepperidge Farm had maintained four Thrift Stores in Southern California during the period 1975 to July, 1977. These four Thrift Stores were closed thereafter and one was moved thereby reducing Pepperidge Farm's ability to handle over-codes (ER. 611, .1507). The Thrift Store expressly reserved the right to reject returns based upon their needs. Pepperidge Farm took steps to caution the distributors on the right of rejection (ER. 453, 1507).

The claim that stales constitute 2% of the Distributors' sales is based upon Thrift Store returns. Yet the Thrift Stores have an absolute right of rejection (ER. 453. Mesirow Dep., CR. 216, 467, 471, 472). The large quantities of stales shouldered by petitioners are the result of quotas and pressure tactics (ER. 440,

444-448). The Longs account was to be Pepperidge Farm's "safety valve" (Id.). The distributors of Pepperidge Farm who capitulated to its request to sign declarations against their interests and whose volume is analogous to petitioners' did not indicate the percentage of their volume of stales (Mr. Hermann; ER. 1341-1346; for his volume, see ER. 474).

It is said that Petitioners' stale problems are, in part, because they over-ordered on promotions because it made them feel like "big guys" (Respondent's Brief, p. 13). The precise testimony is that the Pepperidge Farm Manager pushed the petitioners into over buying by stating: "You're the big guy. You can do it." (ER. 949-950.)

Another claim is that the stales problem arose because Mesirow and Morris were at all times free to order whatever quantities they chose and over-ordered (Respondent's Brief, p. 13). These references point to an opposite conclusion; they

refer to automatic shipments by Pepperidge Farm, or "standard orders." Pepperidge Farm places the distributor on a computer and he gets a standard shipment from Pepperidge Farm unless he makes a prior cancellation. Should he miss the cancellation deadline or miscalculates, he will have over-ordered (ER. 63). Standard orders are simply another product risk shouldered by the distributor. This is especially so shortly after territorial splits because there is no experience with the narrowed territory.

The evidence is that petitioners were a major factor for the success of Pepperidge Farm in the San Francisco Bay Area (ER. 447).

B. Petitioners Were Severely Damaged By The Policies of Pepperidge Farm.

1. Pepperidge Farm has engaged in unsupported argument in its claim that petitioners obtained capital gains on the territory splits.

The chart of claimed gains on the territorial splits is utter final argument

(Respondent's Brief, p. 17). It ignores petitioners' $238,000 investment in their business and the reasons for the sales (ER. 1480). The damage claims of petitioners are substantial (ER. 385). If reasonable amounts are allocated for the managerial and accounting time shouldered by petitioners they have never made a cent from distributing Pepperidge Farm products (ER. 442-443). Pepperidge Farm knows that it is obtaining the services of independent distributors and saving at least $20,000 per year per man by avoiding union wage scales (ER. 442).

C. Pepperidge Farm Cannot Avoid the Substantial Evidence that Territorial Splits are Coerced.

The temerity of Pepperidge Farm is exposed in its assertions concerning Section 2 of the Sherman Act (Respondent's Brief, pp. 15-16). However, the record contained the testimony from Mr. Montreal, its ex-District and Territorial Sales Manager of specific efforts to pressure a route split (ER. 1440, 1442, 1446:1-

1447:5; 1458-1459; 1462).

Mr. Montreal testified that Mr. Tierney advocated that Pepperidge Farm managers do what had to be done regardless of the legalities. Mr. Montreal testified at ER 1460:18-26:

> **Q.** What do you recall about that subject matter with Mr. Tierney?
>
> **A.** I recall at that same sales meeting, that Midwestern sales meeting, that we discussed at length how we should not try to enforce upon distributors policies that we had no right to enforce upon them.
>
> **Q.** And what did he say?
>
> **A.** He said that I'd just have to figure out a way how to do it."

The Declaration of Mr. Tierney is the core of Pepperidge Farm's motion for summary judgment (ER. 1048-1055).

Dated: August 31, 1983.

Respectfully submitted,

Maxwell Keith
Attorney for Petitioners

FILED
MAY 27, 1982
PHILLIP B. WINBERRY,
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELI MESIROW AND THOMAS MORRIS, Plaintiffs-Appellants,	)	No.81-4471
vs. PEPPERIDGE FARM, INC., a Connecticut corporation, Defendant-Appellee.	)	DC# CV-78-1392 MHP Northern California
	)	ORDER

Before: ANDERSON, Circuit Judge

Appellants' motion to augment the record on appeal by adding the February 24, 1976 letter attached to the motion is denied. However, the letter shall be lodged with the court for such consideration as the panel that hears the case on its merits deems appropriate.

United States
Circuit Judge

February 24, 1976

DEAR DISTRIBUTOR OF PEPPERIDGE FARM PRODUCTS:

As you are probably aware, Fair Trade Agreements have been invalidated by federal statute effective March 11, 1976. Accordingly, this is to advise you that the Fair Trade Agreement between you and Pepperidge Farm, Incorporated will not be effective after March 11, 1976.

Kelly K. Lund

KKL/pew

cc: J.W. Khashou
All DSM's

DECLARATION OF SERVICE
BY MAIL

I am a citizen of the United Sttes and a resident of the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within above-entitled action. My business address is 440 Grand Avenue, #401, Oakland, California. On this day I served the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing 3 true copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail Box at San Francisco, California, addressed to said court and to counsel for respondent addressed as follows:

Forrest A. Hainline, III
Pierson, Ball & Dowd
1200 18th Street, NW
Washington, D.C. 20036

Dated September _____, 1983 at San Francisco, California.

_____

Maxwell Keith